Petition for writ of mandate filed 8/30/96. Writ denied. Appealed to court of appeal 7/18/97.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 34824
	)	
STEVEN V. PEREZ	)	**BOARD DECISION**
	)	(Precedential)
	)	
From demotion from the position of Business Manager II to the position of Associate Governmental Program Analyst with Pelican Bay State Prison, Department of Corrections	)	**NO. 96-09**
	)	
	)	June 4, 1996

Appearances: Gary A. Talesfore, Esq., on behalf of appellant, Steven V. Perez; Robert K. Gaultney, Staff Counsel, Department of Corrections, on behalf of the respondent, Pelican Bay State Prison.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in an appeal by Steven V. Perez (appellant or Perez) from a permanent demotion from the position of Business Manager II to the position of Associate Governmental Program Analyst with Pelican Bay State Prison, Department of Corrections at Crescent City (Department). The ALJ modified the permanent demotion to a temporary demotion for a period of 24 months on grounds that only one of three principal charges was proven.

The Board determined to decide the case itself based upon the record and additional arguments submitted in writing and orally.

After review of the entire record, including the transcripts and briefs submitted by the parties, and having listened to the oral arguments presented, the Board sustains the Department's decision to permanently demote appellant for the reasons expressed below.

FACTUAL SUMMARY

Appellant was first employed as a Correctional Officer in 1981. He transferred to Pelican Bay State Prison (Pelican Bay) as a Business Manager II in 1989. Appellant has no prior discipline.

Civil Service Examination

In the spring of 1990, the Board delegated authority to conduct an open examination for the position of Assistant Clerk to Pelican Bay Prison. The warden delegated authority to conduct the examination to James Hixon, Associate Warden of Business Services. Personnel Officer Elizabeth Hartley was charged with actually conducting the examination. Appellant was Hartley's first-line supervisor, and Hixon was her second-line supervisor. Appellant, Hixon and Hartley talked a number of times about the examination. As a result of these discussions, Hartley understood that she was to conduct the examination to ensure that five seasonal clerks employed at the institution would be in the top three ranks on the list of eligibles certified for employment.[1]

[1]We do not condone any cooperation on Hartley's part of ensuring that the five clerks would score in the top three ranks. While incumbents often score higher than individuals not currently employed, the higher scores should be attributed only to the fact that incumbents have direct experience and, therefore, a better working knowledge of the position than other examinees. The adjustment of scores to ensure that certain individuals score higher or lower is entirely inappropriate.

Pelican Bay received 440 applications for the examination. A written examination was administered on a pass/fail basis. Those who passed were scheduled for an oral examination before one of two interview panels. Hartley chaired the panel which examined the five seasonal clerks who were already employed.

At the conclusion of the oral examination, each competitor was given a score. Those scores placed the five seasonal clerks in the top three ranks, making them eligible for appointment.

After the scores were ranked, however, Hartley realized she had failed to consider veterans' preference points. With the addition of those points, some of the five seasonal clerks were no longer in the top three ranks. Appellant, Hixon, and Hartley met again. Hixon directed Hartley to alter the scores of the seasonal clerks and the veterans by adding or subtracting points so that the seasonal clerks were once again in the top three ranks.

Hartley was uncomfortable with the direction she had been given and created a memorandum which, she felt, would relieve her of responsibility for the alteration. Hartley's handwritten memorandum of April 19, 1990 to appellant recommended that five scores be raised from 91 to 94, and two veterans' scores be lowered from 88 to 82 and 85 to 82, respectively. Her memo stated:

> This will require that Lynn and I "adjust" our scores and our interview notes.

> As we discussed, this has very serious consequences, should an audit reveal these adjustments. The exam would be thrown out and all hires would be voided. If you are still adamant about needing us to take these actions, I need some sort of written directive to protect the exam staff.

Appellant replied to Hartley's memo by noting at the bottom of it, "Based on my discussions, I am directing that you implement the recommendations that are proposed."

Because the veterans had been tested by another panel, Hartley told Margie Manning, the chairman of that panel, to change the veterans' scores pursuant to the memo. Manning adjusted the scores accordingly. The five seasonal clerks were subsequently appointed to the class of Assistant Clerk.

Hartley sealed the memo containing appellant's reply in an envelope. When she left her position as Personnel Officer in May 1990, she gave the sealed envelope to Sandra Gill, the newly appointed Personnel Officer. Hartley told Gill that if there was ever a problem with the Assistant Clerk examination, she might want to open the envelope.

Sometime in 1992, Gill opened the envelope because she was planning to administer another Assistant Clerk examination. Gill read the memo, but did not take any action until investigators from CDC Headquarters Personnel Operations contacted her in April 1993 at which time Gill gave the letter to one of the investigators, Steven Francis.

Francis interviewed Hixon who denied responsibility for the alteration of the examination scores, and said that he had

delegated the matter to appellant. Francis was not able to establish that anyone above Hixon in the chain of command was aware of the alteration.

Sexual Harassment Allegations

Section C of the Notice of Adverse Action lists inappropriate conduct and remarks by James Hixon, appellant's immediate supervisor. Many of the remarks were of a sexual nature. The particular allegation concerning Hixon's comments is that appellant, a supervisory employee, knew that Hixon was creating a hostile work environment for female employees but failed to take action to correct the situation or to report Hixon up the chain of command.

The parties stipulated to the truth of most of the allegations set forth in section C, although the Department failed to demonstrate that a number of the incidents occurred within the statutory time period.[2]

The stipulated facts are listed below in italics followed by additional factual findings.

1. *On one occasion, [appellant] heard Mr. Hixon speaking to Trina Carson, Personnel Specialist I, about 'Daddy Carmen,' referring to Carmen Salvato. Salvato had been a prior supervisor of Carson when she was employed at another institution.*

[2]Pursuant to Government Code § 19635, a notice of adverse action is invalid unless it is served within three years of the time the cause for discipline first arose. The Notice of Adverse Action was served on March 3, 1994. Thus, only incidents which occurred after March 2, 1991 will be considered.

The Department did not present evidence that this event occurred on a date after March 2, 1991.

2. *A retirement dinner for Shirley Buhler, a subordinate, was held at the Ship Ashore. At this occasion, Hixon directed a sexual comment to Carson about a scratch on her nose. This was stated in front of [appellant]. [Appellant] stated that [he was] shocked that this was stated in public.*

Buhler retired on July 30, 1991, and her retirement dinner was within a month of that date.

3. *On several occasions Hixon made the comment, "I'm going to bend them over and bone them until they bleed," or "He/she needs to be boned down." On at least one such occasion, these comments were made in front of Linda Greule, Staff Services Manager I and [Sandra] Gill. These comments were perceived by the hearers as having sexual overtones. [Appellant was] offended and it appeared that the other witnesses were greatly offended.*

Greule established Hixon made the comment about "boning" to her in 1990.[3]

4. *[Appellant] admitted hearing Hixon refer to women as "broads" on numerous occasions. This reference was perceived as derogatory towards females and inappropriate in the work place.*

[3]Greule also testified that a similar comment was made in a staff meeting about a food manager in the latter part of 1992 or early 1993. She believed that appellant was present at the meeting. This incident does not appear in the Notice of Adverse Action and cannot be the basis for a finding.

Greule heard Hixon refer to women as bitches, broads, and dames up until the time Hixon left Business Services in 1993.

5. *[Appellant] heard Hixon tell jokes containing sexual implications and made statements that had a "double meaning," a sexual innuendo.*

CDC did not establish the date upon which Hixon told sexual jokes in appellant's presence.

6. Appellant was charged with observing Mr. Hixon wearing a ball cap on state grounds that had a logo about sex on it. The Department failed to demonstrate that this incident occurred within the statutory time frame.

7. *[Appellant] was present when Hixon made the statement, "If you ever get that lonely, I will bone you down myself" to [appellant's] subordinate, Greule. Gill was also present and was [appellant's] subordinate. This took place while all four were lunching at the Royal Inn. This remark was offensive to everyone who heard it. Greule reported feeling extremely uncomfortable.*

The lunch occurred in 1990 and the allegations in this particular incident amplify the allegations in paragraph number 3.

8. *Hixon referred to Gill as a "skinny bitch" and "skinny broad." [Appellant] asked Hixon not to speak like that but it continued.*

Greule last heard Hixon use the term "skinny bitch" in 1993 while Gill was Greule's subordinate but Greule could not confirm that Hixon called Gill a "skinny bitch" when appellant was present.

9. The notice alleged that during a meeting Hixon related that homosexuals have a sexual practice of placing gerbils up their rectums. All the witnesses who attended the meeting testified that appellant stopped Hixon as he began this story.

10. *During the period 1990 to 1991, you observed that Hixon kept a ball cap in his office which read, "Eat the worm." Despite your thinking this had a sexual connotation, you did nothing to protect your subordinates.*

The Department did not establish that the cap was observed after March 2, 1991.

11. *During the entire period Hixon was employed at Pelican Bay, [appellant] heard him use phrases or terms having a sexual connotation, i.e., "wanger" and "tit in a wringer."*

The ALJ found that CDC did not establish that these statements were made after March 2, 1991. However, the stipulation indicates that Hixon made these statement "during the entire period Hixon was employed."

12. *[Appellant] admitted observing Hixon employ an abusive, intimidating management style. [Hixon] berated and humiliated his subordinates in front of others. He yelled at employees. Hixon failed to provide a supporting work environment.*

All of the witnesses testified that Hixon yelled at and humiliated his subordinates, including appellant, through 1993. Greule, Gill, and appellant did not report Hixon to anyone outside the chain of command at Pelican Bay because they believed that to

do so would make their job situations worse. They all believed that they were victims of Hixon's management style, and powerless to change it.

In 1991, Gill was urged by friends of hers on CDC headquarters staff to report Hixon's conduct, but she did not do so. Greule, Gill, and appellant believed that Hixon's management style was well known to the Warden, Chief Deputy Warden, Richard Kirkland, and employees at CDC headquarters.

Greule was supervised by appellant from March 1990 until September 1990, when she began reporting directly to Hixon. Gill reported to appellant from April 1989 to August 1991 when she was placed under Greule's supervision. Neither Greule nor Gill were appellant's subordinates in the latter part of 1992 or early 1993. Gill reported directly to Greule, and Greule reported directly to Hixon.

Of the twelve allegations of sexual harassment by Hixon listed in the Notice of Adverse Action, allegations 1, 3, 5, 6, 7 and 10 must be dismissed because the Department failed to demonstrate that these incidents occurred within the three year statutory time frams. [4] (Government Code § 19635). Allegation 2 must be dismissed because the allegation "a sexual remark about a scratch on [Carson's] nose" lacks specificity sufficient to meet basic pleading requirements. [Leah Korman, SPB Decision No. 91-04] (when an appellant is not told what acts are being punished, the

[4]Allegations are enumerated on pages 5-8.

appellant is hampered in his ability to prepare a defense)]. Allegation 8 must be dismissed because the Department failed to prove that appellant was present when the remark "skinny bitch" was made in 1993. Allegation 9 concerning Hixon's remark about gerbils alleged to have been made in appellant's presence is found not to be cause for discipline. The evidence proved that appellant stopped Hixon from telling his gerbil story.

The three remaining timely allegations were proven: Hixon referred to women as "broads" (allegation 4), Hixon often used terms having a sexual connotation such as "wanger" or "tit in the wringer" (allegation 11) and appellant observed Hixon employing an abusive, intimidating management style (allegation 10).

ISSUES

1. Whether the allegations of civil service are barred by the three year statute of limitations?

2. Did the appellant have a duty to report his supervisor for conduct which constituted sexual harassment when the target of the harassment was not appellant's subordinate?

3. What is the appropriate penalty under the circumstances?

DISCUSSION

Allegations

In the Notice of Adverse Action, appellant is charged with participating in a scheme to change scores on a civil service examination, interfering in the hiring of an employee in the

Medical Department[5], and failing to report up the chain of command his supervisor's inappropriate conduct. These charges are alleged to constitute legal cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (f) dishonesty, (o) willful disobedience, (t) other failure of good behavior, on or off duty, causing discredit to the agency, and (w) unlawful discrimination (sexual harassment).[6]

Civil Service Examination

Appellant argues first that the charge of manipulating civil service examination scores should be dismissed as untimely. Government Code § 19635 provides:

> No adverse action shall be valid against any state employee for any cause for discipline based on any civil service law of this state, unless notice of the adverse action is served within three years after the cause for discipline, upon which the notice is based, first arose. Adverse action based on fraud, embezzlement, or the falsification of records shall be valid, if notice of the adverse action is served within three years after the discovery of the fraud, embezzlement, or falsification.

[5]The Department did not present any evidence supporting the allegation that appellant interfered in the hiring of a person for a position in the Medical Department at Pelican Bay. The charge is dismissed.

[6]The Department also alleged that appellant's conduct violated Government Code section 18500, subsections (2), (4), and (7) and the CDC Director's Rules, Rule 3391 "Conduct." (tit. 15, Cal. Code Regs., sec. 3391.) To the extent that these provisions are relevant to the factual and legal allegations, they are subsumed within the charged subsections of Government Code section 19572.

Appellant notes that the Pelican Bay Warden had delegated hiring authority to Hixon, and Hixon had knowledge from the beginning in connection with the civil service examination. Appellant argues that, therefore, knowledge of the fraud must be attributed to CDC as early as April, 1990. Since CDC failed to take action within three years of that time, appellant contends, the charge must be dismissed. Appellant also argues that the adverse action is untimely because the Department failed to plead and prove that they could not have discovered the fraud earlier. We disagree.

Appellant, Hixon, Hartley, and Manning, acted in concert to alter examination scores by raising some CDC seasonal employees' scores and lowering some veterans' scores. There was no showing that the Pelican Bay Warden or anyone other than the individuals involved had knowledge of the fraud until the 1990 memo was opened by Personnel Officer Gill in 1992.

Appellants would have us read into Government Code § 19635 technical pleading requirements that are typically read into the statute of limitations provisions set forth in the Code of Civil Procedure § 338 when an action is brought on grounds of fraud or mistake. As here, the general rule in civil tort actions is that the action must be brought within three years of the day the action arose. (Code of Civil Procedure § 338). Again, as here, in a suit brought on grounds of fraud or mistake, there is an exception to the three year statute of limitations set out in section 338: the

statute of limitations does not begin to run until the aggrieved party discovers the facts constituting fraud or mistake. In interpreting section 338, however, courts have traditionally read into the statute the technical requirement that the aggrieved party must:

> '. . . plead and prove the facts showing: (a) Lack of Knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake.' (People v. Doctor (1967) 257 Cal.App.2d 105, 111 quoting Weir v. Snow (1962) 210 Cal. App.2d 283, 292.

The Board does not require such technical pleading. As noted in Sides v. Sides (1953) Cal. App.2d 349, "[t]he purpose of [the plead and prove] requirement is to enable the court to determine whether, with due diligence, the fraud should have been discovered sooner." In practice before the Board, it is enough that the Department plead facts which indicate that the discovery exception is implicated. This fulfills the due process notice requirement. In addition, the Department must be prepared at hearing to present evidence that would enable the hearing officer to determine whether, with due diligence, the fraud should have been discovered sooner.

In the present case, the Department presented evidence that Department management had no actual notice of the fraud until Steven Francis, an investigator from CDC Headquarters Personnel Operations, read the letter in April of 1993 and began the

investigation that lead to this disciplinary action. [7] Nothing in the record demonstrates that the Pelican Bay Warden or the CDC Director were possessed of any information that could have alerted them to the fraud until they were confronted with the information from the investigator. Thus, by pleading the fact that the fraud was not discovered until April, 1993 and by demonstrating at hearing that it had neither knowledge nor presumptive knowledge of the fraud, the Department has carried its burden sufficient to invoke the discovery exception.

Appellant also argues that his actions in approving the altered scores were not illegal because he lacked first-hand experience in administering examinations and relied upon Hixon's administrative expertise. Appellant testified that Hixon told him the scores could be re-evaluated because they had not yet been finalized and transmitted to headquarters.

We reject this argument as well. We do not believe that appellant, a Business Manager II, could reasonably believe that competitive examination results could be changed in order to insure that specific individuals would be reachable on an employment list. The method used to adjust the scores required not only that the scores of certain incumbents be raised, but that the scores of qualified veterans be lowered. In addition, the Personnel Officer,

[7]Even if we date the Department's actual knowledge to the earlier date sometime in 1992 when Gill opened and read Hartley's letter, the disciplinary action taken against appellant would still be timely.

Hartley, informed appellant of the consequences should an audit reveal the changes to the examination. Thus, appellant was on notice and should have known that the examination results could not be re-evaluated.

Inexcusable neglect of duty may be found if there is "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." (Robert Herndon (1994) SPB Dec. No. 94-07, p. 6.) Appellant had a duty to ensure that the list of eligibles for Assistant Clerk was the result of a fair and competitive examination. Appellant's knowing and intentional order to his subordinate affirming previous direction that she alter civil service examination scores by raising some scores and lowering others constitutes inexcusable neglect of duty under Government Code § 19572, subdivision (d).

Appellant's conduct also constituted other failure of good behavior which caused discredit to the agency pursuant to Government Code section 19572 (t), and dishonesty under Government Code § 19572, subdivision (f).

FAILURE TO REPORT SEXUAL HARASSMENT

Appellant is not himself charged with any conduct of a sexually harassing nature. Instead, appellant is charged with having knowledge that his supervisor's crass comments were creating a hostile work environment for female employees and then failing to take action to correct the situation or to report his supervisor up the chain of command.

Did Hixon's Conduct Constitute Sexual Harassment?

As noted above, the Department proved three allegations: appellant observed that Hixon consistently referred to women as "broads", Hixon often used terms having a sexual connotation such as "wanger" or "tit in a wringer," and Hixon employed an abusive, intimidating management style. At the outset, we do not find this conduct constituted sexual harassment. There was no evidence in the record that demonstrated that any female employee felt that Hixon's conduct described in these three allegations created a hostile work environment so as to constitute sexual harassment. Harris v. Forklift Systems, Inc. (1993) 510 U.S. at __, 126 L.Ed 2d 295 (sexual harassment is found when the work place is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment).

A finding that Hixon's conduct was not sufficiently severe or pervasive to constitute sexual harassment does not, however, answer the question of whether appellant had a duty to report Hixon's offensive behavior. The pattern of Hixon's conduct as directed to female subordinate employees could have, under some circumstances, constituted sexual harassment which would expose the employer to liability. (Government Code § 12940.) In Carosella v. U.S.P.S. (Fed. Cir. 1987) 816 F.2d 638, the Court of Appeals affirmed an employee's dismissal stating:

> An employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace

> environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action. The agency need show only that the employee's misconduct is likely to have an adverse effect upon the agency's functioning....Further, the employer need not place its own liability at risk, as could follow if an employer fails to take timely action after receiving notice of the prohibited acts. Carosella, 816 F.2d at 643.

Assuming an employee has a duty to report another employee's inappropriate sexual comments, that duty probably arises before the supervisor's conduct is so egregious that the employing Department will unquestionably be liable in a sexual harassment lawsuit. Thus, whether or not Hixon's conduct constituted sexual harassment is not determinative of the issue of whether appellant had a duty to report Hixon's conduct. [8]

Did Appellant Have a Duty to Report Hixon's Conduct?

The Board has found that a supervisor has a duty to protect his or her subordinates from sexual harassment in the workplace. (Theodore J. White(1994) SPB Dec. 94-20, at p. 4.) thus, if appellant knew that his subordinates were being sexually harassed, we would have no difficulty finding that appellant had a duty to protect these subordinate employees. The Department failed to

[8]While the Board adheres to the Title VII standard for determining whether cause for discipline exists under Government Code § 19572, subdivision (w), sexual harassment, the Board has not hesitated to find that the Department may impose discipline for conduct which does not rise to the Title VII standard but is, nonetheless, offensive. Conduct which may not meet the minimum legal standard for a finding of sexual harassment may be chargeable as cause for discipline as discourtesy (Jose Flores (1994) SPB Dec. No 94-24), as willful disobedience of a sexual harassment policy (id.), or as other failure of good behavior pursuant to Government Code § 19572, subdivisions (m), (o) and (t).

demonstrate, however, that appellant functioned in a supervisory capacity over any of the women Hixon was said to have harassed.

The Department contends that appellant's mere status as a supervisor imposes a duty that he reports sexually harassing conduct even if the targets of the harassing conduct are not his own subordinates. The Department bases this argument on Government Code § 12940 which provides, in pertinent part:

> It shall be an unlawful employment practice . . .
>
> (h) (1) For an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful <u>if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate corrective action</u>. (emphasis added.)

The overall focus of Government Code § 12940 is to define when an employer will be held liable for sexual harassment. This subsection distinguishes two categories of harassment depending on who is doing the harassing. The first category concerns conduct by a supervisor against a subordinate. The second category of harassment concerns harassment of one co-worker by another. The underscored phrase in Government Code § 12940 provides that an employer will be liable for an employee's sexual harassment of a co-worker only when the employer has actual or imputed knowledge of the harassment and fails to take action to correct the problem.

The Department argues that since it must take immediate and appropriate action once the agent or supervisor knows of harassing

conduct, or face liability, all supervisors have a duty to report such harassing conduct by any employee. While we express no opinion as to the proper interpretation of the language nderscored above, we reject the Department's argument that Government Code § 12940 necessarily puts every supervisor in state service on notice that he or she has a duty to insure a sexual harassment free environment for every employee regardless of chain of command or hierarchical relationship. Put another way, whether or not appellant's knowledge of Hixon's conduct could have been imputed to the Department such that the Department would have been liable based on that knowledge, we do not believe that the statute so clearly spells out a supervisor's duty that the appellant in this case would be on notice that he had a duty to act.[9]

This is not to say that the Department cannot protect itself by requiring supervisors or any other employee to report sexual harassment or conduct that, if it continued, could rise to the level of sexual harassment. We recognize that the Department has a real interest in protecting its employees from harassment and protecting itself from liability . In order to establish such a duty, however, the Department must present its supervisors with a

[9]We note that the Department's view would require that we read two separate definitions of the term "supervisor" into this one statute. In Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 416, fn. 4, the court interpreted the term "supervisor" as it appears in the phrase "by an employee other than an agent or supervisor" to mean an individual who functionally supervises a sexual harassment complainant. We find it unlikely that a court would interpret the second use of the term supervisor to mean "any individual with the status of supervisor."

policy that clarifies a duty to report any inappropriate conduct observed, whether that conduct be of a subordinate, co-worker or supervisor. [See Errol L. Dunnigan (1993) SPB Dec. No. 93-32. In this case, the record contains no evidence that Perez had been informed of this duty to report the offensive conduct of his supervisor.

We find that Perez did not have a known duty to report his supervisor.

PENALTY

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". (Government Code § 19582). To render a decision that is "just and proper", the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id. at 217-218.)

Appellant participated in a scheme which resulted in the illegal alteration of civil service examination results. Competitive examination is the linchpin of the state civil service.

"In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examinations." (Cal. Const., Art. VII, section 1(b).) Appellant purposely acted to violate the principle of merit by altering several examination scores. In addition, appellant directed his subordinate to alter the examination scores, thereby, exposing her to disciplinary action as well.

Appellant's actions undermined the civil service system, jeopardized the list eligibility of examinees and created an unfair advantage for an exclusive group of workers. It is difficult to imagine conduct more harmful to the public service than that engaged in by appellant. We see no mitigating circumstances.

Even though we have dismissed the other charges against appellant, we disagree with the ALJ's decision to reduce the permanent demotion taken by the Department to a temporary demotion. We believe that a permanent demotion is more than justified and see no reason why, after committing civil service fraud, appellant should be returned to his Business Manager II position.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The permanent demotion taken against appellant, Steven V. Perez, is sustained without modification.

2. This decision is certified for publication as a Precedential Decision (Government Code section 19582.5).

THE STATE PERSONNEL BOARD*

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member

*Member Alice Stoner, dissenting: I find credible appellant's contention that he was merely following his supervisor's instructions and did not know that his actions in recalculating the scores were improper. Had he believed he was doing something improper, he would not have signed the note Hartley prepared. I would revoke the discipline.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 4, 1996.

_____
C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board